


Summer 2007

Why Don't "Reasonable Women" Complain About Sexual Harassment?

L. Camille Hébert

Michael E. Moritz College of Law at The Ohio State University

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Hébert, L. Camille (2007) "Why Don't "Reasonable Women" Complain About Sexual Harassment?," *Indiana Law Journal*: Vol. 82: Iss. 3, Article 4.

Available at: <http://www.repository.law.indiana.edu/ilj/vol82/iss3/4>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Why Don't "Reasonable Women" Complain About Sexual Harassment?[†]

L. CAMILLE HÉBERT*

INTRODUCTION.....	711
I. THE REASONABLENESS OF COURTS' EXPECTATIONS OF WOMEN VICTIMIZED BY SEXUAL HARASSMENT.....	713
A. <i>The Standards for Employer Liability for Sexual Harassment</i>	713
B. <i>Judging the Reasonableness of Employees' Responses to Sexual Harassment</i>	721
II. HOW "REASONABLE WOMEN" ACTUALLY REACT TO SEXUAL HARASSMENT.....	729
A. <i>The Appropriateness of Applying the "Reasonable Woman" Standard to the Issue of Employer Liability for Sexual Harassment</i>	729
B. <i>The Reasonableness of Women's Responses to Sexual Harassment</i> ..	734
CONCLUSION.....	742

INTRODUCTION

The development of sexual harassment law is replete with instances of "blaming the victim." The requirement that women prove that even sexually abusive and denigrating conduct is unwelcome is based upon the belief that women often invite sexual attention by their conduct, their dress, and even their mere presence.¹ The requirement that women show that the abusive conduct directed toward them is both subjectively offensive and objectively hostile and abusive is based on the concern that overly sensitive women will make a "federal case" out of the innocent and relatively

[†] Copyright 2007 L. Camille Hébert. All rights reserved.

* Carter C. Kissell Professor of Law, Michael E. Moritz College of Law at The Ohio State University. I want to thank Kathryn Krisher, The Ohio State University Moritz College of Law Class of 2005, and Elizabeth Evans, Class of 2007, for their excellent research and editing assistance in connection with this Article. I also want to thank my colleagues Marc Spindelman and Martha Chamallas for their helpful comments on an earlier draft of this Article.

1. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, the plaintiff alleged that she was followed into the restroom, fondled in front of other employees, and forcibly raped by her supervisor. *Id.* at 60. The Court determined that, "[w]hile 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." *Id.* at 69. See also *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991). The court in *Reed* agreed with the trial court's finding that the plaintiff welcomed behavior that included having her face pushed into a toilet and having a cattle prod placed between her legs by her actions of using offensive language, not wearing a bra, giving a softball warmer resembling a scrotum to a male coworker, and exhibiting to male coworkers her abdominal scar resulting from a hysterectomy. *Id.* at 486-87.

innocuous sexually related conduct of their coworkers and supervisors.² Even the insistence of courts that women establish that explicitly sexual and gender-based conduct was directed at them “because of sex” appears to reflect a concern that women will provoke such conduct toward them by other aspects of their personalities and then will seek to claim that the conduct occurred because they are women.³

In recent years, this phenomenon of blaming the victim has expanded from the realm of the standards for actionable sexual harassment into the issue of employer liability for such harassment. In an increasing number of sexual harassment cases in which courts have concluded—or at least assumed—that actionable harassment has been established, those same courts have excused the employer from liability for that harassment, concluding that the employer should not be held liable because the employer is not to blame for the harassment. Often the rationale for this conclusion is that the victim of harassment failed to bring the harassment to the employer’s attention or has improperly delayed—or committed some other blameworthy act—in doing so. Accordingly, these courts, while not necessarily holding women responsible for the harassment targeted at them, have found that the women’s actions contributed to the duration or severity of the harassment, thereby reducing or eliminating their ability to recover for the harms caused by that harassment.

In reaching these decisions, the courts have generally concluded that women who fail to complain promptly or at all have acted inappropriately—that they have been “unreasonable” in their responses to being sexually harassed by their supervisors and their coworkers. This Article challenges the conclusion of those courts that those women who fail to promptly report through official channels that they have been sexually harassed have acted unreasonably. In doing so, this Article explores the reasons why women choose other measures to deal with the harassment to which they are subjected and explains why those choices are not inappropriate, given both the circumstances in which women find themselves, and the organizational and legal context in which those choices are made.⁴ This Article concludes that courts might

2. See, e.g., *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161, 163–64 (D. Ariz. 1975) (“[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.”).

3. See Rebecca Hanner White, *There’s Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 735–36 (1999) (“After all, a woman in a male-dominated workplace may be harassed because she is a woman, or she may be harassed because she is a jerk. The former situation would support a Title VII claim; the latter would not.”).

4. A number of other commentators have examined the phenomenon of victims’ responses to sexual harassment and explored the reasons that victims often fail to make formal complaints. See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 312–31 (2001) (discussing social science research indicating that most victims of sexual harassment do not report it and the reasons that victims give for failing to report, and suggesting changes to be made to the law to accommodate these findings); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–42 (2005) (noting, in the context of a discussion of retaliation, the reluctance of victims of discrimination and harassment to challenge the conduct to which they are subjected); Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 373–380 (2004) (exploring, in the context of

better be able to judge the reasonableness of women's responses to sexual harassment by application of the "reasonable woman" standard—or the standard of the reasonable victim in the same circumstances as the plaintiff. This standard, which is currently applied by some courts in judging whether sexually harassing conduct is sufficiently offensive or abusive to violate Title VII, is equally applicable to the question of the objective reasonableness of the manner in which victims of sexual harassment complain—or fail to complain—about being sexually harassed.

Part I of this Article addresses the manner in which the courts have applied the standards for employer liability for sexual harassment and critiques the conclusions of those courts about the reasonableness of the employee's responses to sexually harassing conduct. In Part II, the Article addresses the ways in which women typically respond to sexual harassment—other than by immediately filing a formal complaint—and explains the reasonableness of such actions. Part II of the Article also explains why it would be appropriate and helpful for courts to apply a gender-conscious standard of reasonableness in judging women's responses to sexual harassment.

I. THE REASONABLENESS OF COURTS' EXPECTATIONS OF WOMEN VICTIMIZED BY SEXUAL HARASSMENT

A. The Standards for Employer Liability for Sexual Harassment

1. The *Ellerth/Faragher* Affirmative Defense

In two cases decided the same day, *Burlington Industries, Inc. v. Ellerth*⁵ and *Faragher v. City of Boca Raton*,⁶ the United States Supreme Court addressed the question of employer liability for supervisory sexual harassment.⁷ Although providing

discussion of constructive discharges, the general failure of employees to report the harassing conduct to which they are subjected); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 722–29 (2000) (noting the ways that the affirmative defense of an employer places conditions of notice on employees that are inconsistent with the actual evidence of the way in which victims respond to sexual harassment); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 175–92 (2001) (describing social science research concerning women's general failure to formally report sexual harassment and the reasons behind this failure to do so).

These commentators generally have not focused on the disparate burdens placed on women by the de facto requirement of prompt, formal reporting imposed by the courts or the use of the "reasonable woman" standard as a way to respond to those burdens. *But see* Brake, *supra*, at 32–36 (noting social costs on women and minorities of complaining about discrimination); Chamallas, *supra*, at 383 n.310 (suggesting that reliance on the "typicality" of targets' responses can avoid a focus on the issues of perspective and the gender of the target of harassment because the evidence indicates that few targets of harassment actually report the harassment); Grossman, *supra*, at 728–29 (suggesting that courts might take a "more contextualized approach to determining 'reasonableness'" in connection with the affirmative defense and referencing the reasonable woman standard).

5. 524 U.S. 742 (1998).

6. 524 U.S. 775 (1998).

7. The rules of employer liability set forth in the Supreme Court's decisions in *Ellerth* and *Faragher* apply only with respect to harassment by supervisory employees. *E.g.*, *Ellerth*, 524 U.S. at 765 (holding that an employer is subject to vicarious liability when the "actionable

somewhat different analyses of the issue, the Court in both cases adopted a rule providing for vicarious liability of the employer for actionable harassment by a supervisor in the employee's chain of command.⁸ Although no affirmative defense is available when the harassment "culminates in a tangible employment action" (such as discharge or a demotion),⁹ an affirmative defense *is* available when no such tangible employment action has been taken.¹⁰

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may

hostile environment" is created by a supervisor "with immediate (or successfully higher) authority over the employee"); *Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2d Cir. 2003) (reiterating the *Ellerth/Faragher* holding that restricts vicarious employer liability to cases involving harassment by supervisors); *Morgan v. Fellini's Pizza, Inc.*, 76 F. Supp. 2d 1368, 1371–72 (N.D. Ga. 1999) (holding that the standard of employer liability set forth in *Faragher* does not apply to a plaintiff's claim of sexual harassment by two coworkers without supervisory authority).

The standard of employer liability for the sexually harassing conduct of coworkers or other nonsupervisory employees, as well as by third parties such as customers or clients, continues to be provided by the advice—short of a holding—that the Court gave in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In that case, the Court rejected the employer's contention that an employer is protected from liability for sexual harassment by "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure." *Id.* at 72. Instead, the Court suggested that the circumstances of the case—including details of the employer's policy and grievance procedure—were relevant in determining the employer's liability. *See id.* at 71. The *Meritor* Court indicated that the employer's policy in that case did not specifically mention sexual harassment and that the policy required the employee to complain to her supervisor, who she was accusing of harassment. *Id.* at 72–73. Noting that it was "not altogether surprising that respondent failed to invoke the procedure and report her grievance to [the supervisor who was harassing her]," the Court noted that the employer would have a stronger argument for avoiding liability "if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73. Courts have described this standard of employer liability as based on a negligence standard, allowing an employer to be held liable for the sexually harassing conduct of nonsupervisors "'only if plaintiff demonstrates that the employer knew or should have known of the harassment and failed to take immediate and appropriate action.'" *Lissick v. Merrill Commc'ns, LLC*, No. 02-3676 ADM/AJB, 2003 U.S. Dist. LEXIS 16840, at *22 (D. Minn. Sept. 23, 2003) (quoting *Ciszewski v. Engineered Polymers Corp.*, 179 F. Supp. 2d 1072, 1097 n.23 (D. Minn. 2001)); *see also Palesch v. Mo. Comm'n on Human Rights*, 233 F.3d 560, 566 & n.5 (8th Cir. 2000) (citing *Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999)). Accordingly, while an employee's complaint of sexual harassment by coworkers or third parties is relevant to the employer's potential liability because it may have put the employer on notice about the harassment, the focus on employer liability ultimately depends on the employer's actions, not the employee's actions.

8. *Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 807–08.

9. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

10. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.¹¹

The majority's language unambiguously indicates that the Supreme Court intended to require employers to prove both that they exercised reasonable care with respect to sexually harassing conduct and that the employee acted unreasonably with respect to his or her response to that harassment. The Court noted that the affirmative defense was intended to support Title VII's "policies of encouraging forethought by employers and saving action by objecting employees."¹² The Court noted that the defense consisted of "two necessary elements" and used the conjunction "and" between the two prongs of the affirmative defense,¹³ clearly indicating its position that both prongs needed to be satisfied by the employer who hoped to avoid vicarious liability for supervisory harassment.¹⁴

Although the *Ellerth* and *Faragher* cases were originally proclaimed to be favorable to employees by imposing more stringent standards of liability on employers for sexual harassment by supervisory employees, the lower courts have applied these cases in ways quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment.¹⁵ The courts have accomplished these results in a number of different ways—ways that are inconsistent with the Supreme Court's new standards for employer liability.

Most courts have purported to recognize that the Supreme Court has imposed a two-prong affirmative defense on the employer, such that the employer bears the burden of persuasion to prove *both* prongs of the defense—that the employer acted reasonably

11. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

12. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

13. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

14. That this is the proper interpretation of the Court's language also seems clear from Justice Thomas's dissenting opinion in the *Ellerth* case. He objects both to the majority's rule of vicarious liability of employers for supervisory employee sexual harassment and the requirements of the affirmative defense to such liability. *Ellerth*, 524 U.S. at 771 (Thomas, J., dissenting). He notes that "employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm. In practice, therefore, employer liability very well may be the rule." *Id.* at 773 (emphasis in original) (citation omitted). Justice Thomas clearly understood the majority's articulation of the affirmative defense to be imposing a two-part obligation on the part of employers seeking to avoid vicarious liability, and he recognized that this obligation would create liability for employers in cases in which both the employer and the harassed employee acted reasonably.

15. See David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1283–88 (2001) (reporting that employers won the majority of the first seventy-two cases involving employer summary judgment motions based on the *Ellerth* and *Faragher* affirmative defense).

and the employee acted unreasonably.¹⁶ Not all courts, however, have held the employer to rigorous standards of proof in proving the affirmative defense. Indeed, even though the defense, by its terms, requires the employer to establish the unreasonableness of the plaintiff's actions, some courts appear to be placing a burden of proof on the plaintiff to establish the reasonableness of his or her actions.¹⁷ Other courts, while still placing the ultimate burden of persuasion on the employer, have also imposed a burden of production on the plaintiff. In these courts, after the employer has shown that the employee completely failed to use a complaint process, the plaintiff has been required to come forward with reasons for the failure to use that process, and the courts have considered the adequacy of those reasons in determining whether the employer's burden of persuasion has been carried.¹⁸

2. Modifications of and Objections to the Affirmative Defense

Some courts and individual judges, however, have gone so far as to suggest that the Supreme Court in *Ellerth* and *Faragher* could not have meant what it said when it imposed the burden of persuasion as to both prongs of the affirmative defense on the employer. In *Watkins v. Professional Security Bureau, Ltd.*,¹⁹ the Fourth Circuit noted that it would have directed a verdict as a matter of law for the employer even if it had concluded that the plaintiff's actions with respect to her complaint of sexual harassment against her supervisor were reasonable:

Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation.²⁰

16. See, e.g., *Hardy v. Univ. of Ill. at Chi.*, 328 F.3d 361, 365–66 (7th Cir. 2003) (refusing to uphold summary judgment for employer because questions of fact remained regarding the reasonableness of employee's delay in reporting harassment); *Watts v. Kroger Co.*, 170 F.3d 505, 510–11 (5th Cir. 1999) (reversing district court's grant of summary judgment for employer because a jury could find employee's delay in reporting harassment to be reasonable); *Allen v. Mich. Dep't of Corr.*, No. 96-CV-71684-DT, 1999 U.S. Dist. LEXIS 20223, *9–12 (E.D. Mich. Nov. 24, 1999) (refusing, in the context of a racial harassment action, to grant summary judgment for the employer on the issue of employer liability because, while the employer could establish that it acted reasonably to prevent and correct harassing conduct, it did not establish that the plaintiff unreasonably failed to take advantage of preventative and corrective opportunities).

17. See, e.g., *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245–46 (2d Cir. 2001) (recognizing that the district court's opinion might "be construed to have shifted the burden of persuasion to require [the employee] to prove that she acted reasonably").

18. See *id.* at 246.

19. No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999).

20. *Id.* at *21 n.16 (citations omitted).

What the *Watkins* court failed to recognize is that the Supreme Court *did* speak to this issue in *Ellerth*, when the Court clearly held that the employer was required to establish both prongs of the affirmative defense—that the employer acted reasonably *and* that the employee acted unreasonably. When both parties act reasonably—the plaintiff makes a prompt report or is justified in not doing so and the employer has taken appropriate preventive actions and reacts appropriately to a report of sexual harassment—the employer is still liable because the affirmative defense has not been proven. The court of appeals in *Watkins* completely failed to recognize that such a result serves other laudable purposes, such as the appropriate allocation of liability between an employee who has been sexually harassed and the employer who has put a sexual harasser in a position of authority that facilitated the harassment.

In *Indest v. Freeman Decorating, Inc.*,²¹ Judge Jones of the Fifth Circuit also sought to avoid the effects of the affirmative defense by suggesting that the *Ellerth* and *Faragher* cases do not control when an employer promptly takes action to remedy harassment after being promptly informed by the harassed employee.²² The court reasoned that because of the factual differences between those cases and the case before it, the Supreme Court decisions were not controlling:

Ellerth and *Faragher* do not, however, directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to Freeman's policy and grievance procedure against sexual harassment, and the employer took prompt remedial action. The Supreme Court cases both involve complaints of longstanding supervisor misbehavior, and the plaintiffs either never utilized or claimed not to be aware of the company policies. But for purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment. Although the *Ellerth/Faragher* standard, which imposes vicarious liability subject to an employer's two-prong affirmative defense, does not control, it informs the principles determinative of this case.²³

Ironically, the judge concluded that the rule of the Supreme Court cases did not apply in order to avoid the result that would have been dictated by those cases—a conclusion that the employer *was* liable—but found that the “principles” of those cases did. That is, she justified the decision *not* to hold the employer liable for the supervisory sexual harassment based on the “principles” of the cases, not on what the cases actually held.²⁴

21. 164 F.3d 258 (5th Cir. 1999) (Jones, J.). Although Judge Jones wrote the primary opinion in the case, neither of the other two judges on the panel joined her decision. Judge Wiener, who filed a specially concurring opinion, noted that “[b]ecause Judge Ferguson concurs only in the judgment of this case without concurring in Judge Jones's opinion or mine, neither enjoys a quorum and thus neither writing constitutes precedent in this Circuit.” *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Weiner, J., specially concurring).

22. The harassment in question occurred during a convention from September 8 to 14, the plaintiff reported the harassment on September 13, the employer began its investigation on September 20, and the supervisor was disciplined on or about October 11. *Indest*, 164 F.3d at 260–61.

23. *Id.* at 265.

24. *See id.* at 265–67 (relying on the reasoning of the *Faragher* and *Ellerth* cases to justify

Judge Jones's decision to reject the Supreme Court's opinions on supervisory liability in *Ellerth* and *Faragher* as controlling in *Indest* has come under heavy criticism, including by one of her fellow judicial panel members in *Indest*. In his concurrence, Judge Wiener indicated that the Supreme Court decisions were clearly controlling on the issue of employer liability before the appellate court and rejected Judge Jones's conclusion to the contrary as being "as neat an illusion as any sleight-of-hand artist ever created with a real coin."²⁵ It is a decision, he said, to "disregard totally the Supreme Court's express and carefully explained linking" of the two prongs of the affirmative defense.²⁶

Judge Jones's attempted modification of the standards for employee liability set forth in *Ellerth* and *Faragher* has also been expressly rejected by other courts. For example, in *Harrison v. Eddy Potash, Inc.*,²⁷ the Tenth Circuit indicated that Judge Jones's reasoning in *Indest* was "highly suspect" and indicated that there was "no reason to believe that the 'remarkably straightforward' framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment."²⁸ Similarly, in *Sefiane v. Wal-Mart Stores, Inc.*,²⁹ a New Hampshire federal district court rejected Judge Jones's analysis in *Indest*, noting that "the *Indest* court's refusal to apply the second prong of the *Burlington/Faragher* defense ignores the Supreme Court's unambiguous directive that an employer wishing to avoid vicarious liability must prove both elements of the affirmative defense."³⁰

Other courts, however, have followed the reasoning of Judge Jones's opinion, even after noting the criticism that the opinion has received. In *McCurdy v. Arkansas State Police*,³¹ after noting that Judge Jones had "essentially ignored the second element of the affirmative defense,"³² the district court went on to conclude that Judge Jones's opinion correctly stated the law.³³ The court in that case found that the employer could not establish the second prong of the affirmative defense because the plaintiff had reported the harassment on the very day that it occurred.³⁴ However, the court refused to find the employer's inability to prove both parts of the affirmative defense to be dispositive:

[T]his Court questions the applicability of this second element to the facts of the instant case. Is the employer not entitled to an affirmative defense in the situation where an employee promptly reports an isolated and first incident of sexual harassment, and the employer promptly takes steps to insulate the employee from

the decision to "distinguish[] the *Ellerth/Faragher* test from the case before [the court]").

25. *Indest*, 168 F.3d at 798 (Wiener, J., specially concurring).

26. *Id.* Judge Wiener's special concurrence also refers to Judge Jones's analysis as "cherry-picking of but one of two conjoint elements of the [affirmative] defense," *id.* at 801, as "legal legerdemain," *id.* at 802, and as a "chimera [that] evanesces in the cold light of day, logic, and pure legal analysis," *id.* at 803.

27. 248 F.3d 1014 (10th Cir. 2001).

28. *Id.* at 1026 (citation omitted).

29. No. 00-592-M, 2002 U.S. Dist. LEXIS 5614 (D.N.H. Mar. 27, 2002).

30. *Id.* at *14 n.4.

31. 275 F. Supp. 2d 982 (E.D. Ark. 2003), *aff'd*, 375 F.3d 762 (8th Cir. 2004).

32. *Id.* at 994.

33. *Id.* at 994 n.3.

34. *Id.* at 994.

further harassment and initiates a thorough investigation? Surely not, for this is what Title VII expects of employers.³⁵

In affirming the decision of the district court not to require the employer to satisfy the second prong of the affirmative defense, the Eighth Circuit attempted to factually distinguish the case before it from the *Faragher* and *Ellerth* cases by noting that “[t]he Supreme Court has never addressed the issue we confront today: an employer’s liability for a single incident of sexual harassment perpetrated by a supervisor.”³⁶ The *McCurdy* court went on to note that “[s]trict adherence to the Supreme Court’s two-prong affirmative defense in this case is like trying to fit a square peg into a round hole”; accordingly, the court indicated that it would resolve the issue instead by “critically ask[ing]” whether Title VII was intended to impose what it called “strict employer liability” in the type of case before the court.³⁷ Because the court believed that imposing liability for a single act of sexual harassment when the employer had taken effective remedial action constituted strict liability and “an absurd result,” the court allowed the employer to rely on a “modified” affirmative defense—a defense modified so as to excuse the employer from establishing what, under the facts of this case, it was unable to prove.³⁸

But imposing vicarious liability on the employer in a situation in which the employer is unable to establish both prongs of the affirmative defense is not strict liability; liability is not imposed automatically but because of the employer’s failure to satisfy the standards imposed by the Supreme Court for avoiding liability. And the lower courts’ independent determination of the standard of liability intended to be imposed by Title VII—in the face of contrary authority by the Supreme Court—is beyond the authority of those courts, whether or not they believe the result dictated by the Supreme Court to be “absurd.” These courts may disagree with the concept of imposing liability on an employer when the employer may have done everything that it reasonably should have done to respond to harassment, but in this situation, when the employee has also done everything reasonably expected of him or her, the Supreme Court clearly dictates that the affirmative defense is unavailable and that the employer is therefore liable for the sexual harassment by its supervisory employees.

35. *Id.* (footnote omitted). The district court stated that the answer to its rhetorical question (with its double-negative construction) is “no”—that the employer cannot be deprived of the affirmative defense in that circumstance. *Id.* However, based on decisions of the Supreme Court in *Ellerth* and *Faragher*, the correct answer is clearly “yes”—that the employer would be deprived of the affirmative defense in that circumstance—because it would be unable to prove the second prong of the affirmative defense.

36. *McCurdy*, 375 F.3d at 769.

37. *Id.* at 771. The court of appeals also explained its failure to follow apparent Supreme Court precedent by noting that “[j]udicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases. Instead, we should analyze these defenses based on the unique facts involved in the cases in which courts adopt the defenses.” *Id.* Taken to its logical conclusion, this analysis would mean that the standards set down in Supreme Court cases would be binding only in cases on all fours factually with the cases in which the standards were articulated. This standard would be unmanageable because it would allow lower courts to freely pick and choose the rules they wish to follow.

38. *Id.* at 772.

Some lower courts appear to have attempted another modification of the Supreme Court's articulation of the affirmative defense to employer liability set forth in *Ellerth* and *Faragher*. Although the second prong of the affirmative defense requires the employer to establish that any failure on the part of the employee to take advantage of the employer's preventive or remedial actions was "unreasonable," some courts appear to be quite literally reading that requirement out of the defense. For example, in *Collette v. Stein-Mart, Inc.*,³⁹ the Sixth Circuit, in applying the second prong of the affirmative defense, described it as follows: "The last element of the *Ellerth/Faragher* defense requires the employer to show that the plaintiff failed to take advantage of opportunities to prevent or correct the harassment."⁴⁰ Nowhere in the court's language or analysis⁴¹ did the court directly recognize that a mere failure to take advantage of corrective opportunities is insufficient to satisfy the affirmative defense; it is only if the employee's failure is unreasonable that the requirements of the affirmative defense are met.

Related to this minimization of the requirement that the employer prove unreasonableness on the part of the employee is an issue that continues to be debated—the degree to which the rule articulated by the Court in *Ellerth* and *Faragher* represents a change in the law of employer liability for supervisory harassment. Some courts have taken the position that those cases essentially restated existing law in the circuits and do not represent a fundamental change to the law.⁴² However, the courts that view the new rule merely as a restatement of existing law appear to be underemphasizing the aspect of the affirmative defense that requires a showing that the harassed employee acted unreasonably in response to the harassment—focusing instead mainly on the requirement that the employer establish the reasonableness of its own actions.⁴³ Other courts, however, have correctly recognized that the standards for employer liability set

39. 126 F. App'x 678 (6th Cir. 2005).

40. *Id.* at 686.

41. Although the word "reasonable" does appear once in the court's two paragraphs devoted to this issue, the word appears only in a quotation from another court case. The court itself merely states:

The last element of the *Ellerth/Faragher* defense requires the employer to show that the plaintiff failed to take advantage of opportunities to prevent or correct the harassment. SM satisfies this element. Collette knew she could call a toll-free number to elevate her complaint directly to headquarters, but she never did so. Most significantly, knowing that SM had terminated Davidson, Collette failed to avail herself of the ultimate corrective opportunity: returning to work with the harasser permanently out of the picture.

Id. (citation omitted).

42. See, e.g., *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 777 n.6 (W.D. Ky. 1998) ("The Supreme Court's announcement of an affirmative defense in some ways is no more than the formal and succinct statement of a rule already adopted by several circuits. . . . Sixth Circuit precedent seems similar enough to the new Supreme Court holding that it would often lead to the same result.").

43. The *Sconce* court noted that "[f]or a number of years in the Sixth Circuit and in some other circuits, an employer could avoid liability by responding adequately and effectively to the complaint once it learns of the harassment." *Id.* at 777. "That is now the law for the entire United States." *Id.*

forth by the Court represent a significant change in the law and require the lower courts to rethink their approach to employer liability for supervisory sexual harassment.⁴⁴

B. Judging the Reasonableness of Employees' Responses to Sexual Harassment

1. Failure to Report

A number of courts applying the affirmative defense to vicarious liability of employers for supervisory employees' sexual harassment have been asked to judge the reasonableness of a harassment victim's response to the harassment, and many of those courts have found the conduct of the victim wanting. Courts have been almost uniform in finding a harassed employee's failure to formally report sexual harassment to the employer to be unreasonable.⁴⁵ For example, in *Kohler v. Inter-Tel Technologies*,⁴⁶ on review of a grant of summary judgment, the employer was found to have satisfied the second prong of the affirmative defense "as a matter of law" by demonstrating that the employee did not complain about the sexually harassing conduct of her supervisor prior to quitting her job and did not attribute her quitting to the harassment, even though she knew about the existence of the employer's sexual harassment policy.⁴⁷ The court did not explain why the failure of the plaintiff to complain was unreasonable, treating the very failure to report as if it were per se unreasonable.⁴⁸

44. See *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1028 (N.D. Iowa 2000) (describing *Ellerth* and *Faragher* as "dramatically alter[ing] the landscape of sexual harassment claims premised on the conduct of supervisory employees"); *Morgan v. Fellini's Pizza, Inc.*, 76 F. Supp. 2d 1368, 1371 (N.D. Ga. 1999) ("[T]he *Faragher* decision dramatically changed the law with respect to an employer's liability for hostile environment sexual harassment in favor of Title VII plaintiffs.").

45. See *Sherwyn et al.*, *supra* note 15, at 1286 (noting that courts in all twenty cases involving an employee who failed to report and an employer who satisfied the defense's first prong granted summary judgment in favor the employers).

46. 244 F.3d 1167 (9th Cir. 2001).

47. *Id.* at 1181–82.

48. Although the employee also failed to participate in the employer's investigation conducted after she filed an EEOC charge, the appellate court apparently did not rely on that failure in finding the employer's conduct to be unreasonable. *Id.* at 1181. Further support for the view that courts may be treating failure to complain as per se unreasonable might be found in *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238 (11th Cir. 2004). The court described the affirmative defense as allowing an employer to escape liability by establishing that "the employee failed to take prompt advantage of the employer's system for reporting and preventing harassment." *Id.* at 1245. The court seemed to omit altogether the requirement that the employer demonstrate the "unreasonableness" of the employee's behavior. The court may have just misspoken—not once, but twice—when describing the defense. *Id.* at 1249 n.5 ("Curiously, Pride has not attempted to convince us to affirm the district court's grant of summary judgment on the ground that Pride has established the *Faragher–Ellerth* affirmative defense by showing that Hulsey failed to take advantage of its internal reporting procedures."). The court, however, seemed to be inviting the employer to argue on remand the unreasonableness of the seventeen-year-old employee's conduct in failing to report the assistant manager's persistent sexual harassment during the five weeks that she was employed at the employer's restaurant. *Id.* at 1240–42. During these five weeks, she repeatedly informed the assistant manager that his advances were unwelcome, including by kneeling him in the groin on more than one occasion.

2. Delays in Reporting

The conduct of harassed employees has also been found to be deficient because of delays in reporting claims of sexual harassment.⁴⁹ Even relatively short delays between incidents of sexual harassment and a report of that harassment have been found to be unreasonable. For example, in *Phillips v. Taco Bell Corp.*,⁵⁰ the plaintiff was touched in a sexual manner by her supervisor on March 13, June 12, June 13, June 17, and June 18.⁵¹ She reported the harassment in accordance with the employer's sexual harassment policy on June 20.⁵² The court held that the plaintiff's delay in reporting for three months after the first incident made her behavior unreasonable.⁵³ The court apparently placed no importance on the fact that the plaintiff reported the sexual harassment within days of the beginning of a pattern of escalating harassment. The only event that she did not report in a very prompt manner was a single event—the March 13 event—that she might well have thought was an isolated event, at least until the conduct escalated three months later.⁵⁴

Id. at 1241. She also filed a police report about the incidents the day after she was fired. *Id.* at 1242.

49. See *Jackson v. Arkansas Dep't of Educ., Vocational & Technical Div.*, 272 F.3d 1020, 1026 (8th Cir. 2001) (finding nine-month delay in reporting sexual harassment to be unreasonable); *Shaba v. IntraAction Corp.*, No. 02 C 5173, 2004 U.S. Dist. LEXIS 78, at *16 (N.D. Ill. Jan. 5, 2004) (finding two-month delay in reporting sexually harassing conduct of supervisor—during which time employee recorded events in a log and talked to coworkers about the harassment—to be unreasonable); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254, 1260 (D. Okla. 1999) (finding three-month delay in reporting sexual harassment by supervisor, who had previously been fired for sexually harassing behavior and then reinstated, to be unreasonable).

50. 83 F. Supp. 2d 1029 (E.D. Mo. 2000).

51. *Id.* at 1033.

52. *Id.* at 1033–34.

53. *Id.* at 1034. The court indicated that it was limiting its finding to the particular facts of the case and that “[a] delay of three months and seven days between the first incident of harassment and a plaintiff's first complaint of harassment certainly may not alone prove that the plaintiff employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer or to avoid harm otherwise.” *Id.* at 1034 n.3. The court, however, does not cite to any other action by the plaintiff that would have suggested that her conduct was unreasonable, other than that the plaintiff agreed to the investigator's request that he delay beginning the investigation until he returned from a business trip. *Id.* at 1034. The district court was perhaps reluctant to find that the plaintiff's delay was unreasonable as a matter of law, since the court of appeals had previously indicated in this case that whether the plaintiff's delay was reasonable is a question “best left to the finder of fact.” *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998).

54. Ironically, if the plaintiff had reported that single event of sexual harassment and had faced negative employment consequences as a result, it is possible that she would have been found not to be protected from such adverse action. Employees are protected from retaliatory conduct under Title VII only if the conduct of which they complain actually violates Title VII or, perhaps, if they reasonably believe that that conduct violates Title VII. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001) (per curiam) (holding that because employee could not have reasonably believed that single incident of which she complained constituted actionable sexual harassment, she could not state claim of retaliation). Accordingly, employees who make complaints of sexual harassment very early, before the conduct rises to a level at which it becomes actionable, are not protected by Title VII's provisions against

By contrast, the Equal Employment Opportunity Commission (EEOC) has expressly recognized that a failure to report a first instance of sexual harassment—or even a second or third—is not necessarily unreasonable. In its Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors,⁵⁵ the EEOC, in discussing the second prong of the affirmative defense, noted:

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee *at that time*. An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation. An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process. The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management.⁵⁶

The EEOC guidelines and basic fairness would dictate considering the reasonableness of employee actions in light of then-available information. Instead, however, courts seem to be judging the reasonableness of employee actions in hindsight, based on events that occurred after the initial failure to complain.

An even shorter delay between the first incident of sexual harassment and the plaintiff's complaint—*seventeen days*—was found to be unreasonable in *Conatzer v. Medical Professional Building Services, Inc.*⁵⁷ In that case, the plaintiff's supervisor rubbed up against the side of the plaintiff's chest on September 28 and then placed her head in a headlock between his knees on October 11 or 12.⁵⁸ On October 15, the plaintiff made a formal complaint under the employer's sexual harassment policy.⁵⁹ Even though the first incident took place in front of another supervisor, the district court found the employer's failure to take any action until after the plaintiff made a formal complaint to be reasonable, because that single incident did not give the employer notice of the existence of a hostile environment requiring correction.⁶⁰ Even more striking, however, was the district court's conclusion that the plaintiff's failure to file a formal report immediately after that incident, despite her formal report within three to four days of a second incident, constituted an unreasonable failure to take advantage of preventive or corrective opportunities provided by the employer.⁶¹ It

retaliation and have no recourse if they face adverse action for making such an early complaint.

55. The United States Equal Employment Opportunity Commission, Notice No. 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) No. 289, at 615:0101 (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

56. *Id.* at 615:0112–13 (emphasis in original) (footnotes omitted).

57. 255 F. Supp. 2d 1259 (N.D. Okla. 2003).

58. *Id.* at 1264.

59. *Id.*

60. *Id.* at 1269.

61. *Id.* at 1269–70. The court not only found the plaintiff's conduct to be unreasonable, but indicated that “[t]he record can support only one conclusion regarding plaintiff's inaction, that is, she unreasonably failed to take advantage of any preventive or corrective opportunities provided by MPBS.” *Id.* at 1270.

seems disingenuous for the court to conclude that the *supervisor* had no reason to be alerted to the existence of sexual harassment by the incident that he witnessed, but that the *plaintiff* should have instantly been alerted—by the exact same incident—to the need for a complaint of sexual harassment, such that her delay of just over two weeks could be found to be sufficiently unreasonable to preclude her cause of action.

Interestingly, courts seem more accepting of employers' delays in acting on reports of sexual harassment than they are of employee delays in making those reports. For example, in *Anderson v. Leigh*,⁶² the plaintiff began to experience sexually harassing behavior from her supervisor in mid-August. She experienced escalating harassment on August 23, 24, 26, 29, 31, and September 1, 6, and 7.⁶³ She reported the conduct to another supervisor on September 7, although she did not give the supervisor her harasser's name.⁶⁴ The next day, after the harasser took job-related retaliation against her, she made another report of harassment to the same supervisor, this time providing the harasser's identity.⁶⁵ On September 15, after being on vacation from September 10 to September 14, the plaintiff reported the harassment to the Human Resources Manager; on this same day, the supervisor to whom the plaintiff had initially reported also reported the plaintiff's complaint to the Human Resources Manager.⁶⁶ In finding that the employer had acted reasonably in responding to the harassment, the court dismissed the "short delay" of eight days on the part of the supervisor as not affecting the reasonableness of the employer's response.⁶⁷ However, the court found the plaintiff's sixteen-day delay—from August 22 to September 7—in reporting the harassment to the supervisor to be neither short nor reasonable.⁶⁸ The court did not indicate what made the supervisor's delay reasonable but the employee's delay unreasonable. The court seemingly was simply unwilling to provide an employee any leeway in figuring out how to react to a supervisor's sexually harassing and threatening conduct, but was fully sympathetic to the apparently similar quandary of the supervisor receiving a complaint of sexual harassment against another supervisor.

3. Discomfort, Threats, and Retaliation

Courts tend to reject employees' claims that they did not report sexual harassment because of the discomfort and embarrassment associated with talking about the sexual conduct to which they have been subjected.⁶⁹ Courts have also been unreceptive to

62. No. 98 C 50169, 2000 U.S. Dist. LEXIS 1584 (N.D. Ill. Feb. 10, 2000).

63. *Id.* at *3–4.

64. *Id.* at *4.

65. *Id.* at *5.

66. *Id.* at *18.

67. *Id.* at *17–18.

68. *Id.* at *21 ("The court also finds defendants have satisfied the second prong of the *Ellerth/Faragher* defense, in that Anderson failed to report Leigh's conduct, which started in mid-August, until September 7, when she spoke to Stillwell.").

69. In *Shaw v. AutoZone, Inc.*, 180 F.3d 806 (7th Cir. 1999), the plaintiff indicated that she did not feel comfortable reporting the supervisor's actions, who asked her explicit questions about her sexual activity, including whether she masturbated, and suggested ways for her to have better sex. *Id.* at 810. The court noted that "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms."

employees' claims that they believed that reporting would be futile—even when employees have some justification for that belief, such as information obtained from other employees.⁷⁰

Courts have also been unsympathetic to employees who claim that they were deterred in promptly reporting the existence of sexual harassment because of concerns about the consequences that they would face from making such a report. Courts have generally rejected the contentions of employees that they justifiably delayed reporting sexual harassment because of their fears of retaliation. Even courts that have expressed a willingness to consider the possibility of retaliation as a justification for a delay or failure to report have insisted on objective evidence of the likelihood of retaliatory conduct. Those courts have rejected the suggestion that a plaintiff's subjective fear of retaliation is sufficient;⁷¹ instead, those courts want to see specific evidence that retaliation was *in fact* likely to occur if the employee had complained of harassment,

Id. at 813. In *Watkins v. Professional Security Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999), the plaintiff's assertion that she was embarrassed to report rape by supervisor was "insufficient as a matter of law" to establish that she acted reasonably in failing to promptly and fully report harassment by supervisor; although she did report that the supervisor had touched her breasts and put his hands down her pants, she had indicated that she did not want to pursue the matter. *Id.* at *19–20.

On the other hand, at least one court has indicated that while embarrassment and discomfort cannot excuse a failure to report, it may reasonably affect to whom an employee reports a claim of sexual harassment. For example, in *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026 (N.D. Iowa 2000), the plaintiff reported sexual harassment by her supervisor to another supervisor, whom she also considered a friend. *Id.* at 1033. Although that supervisor did report up the chain of command, the employer sought to prove that the plaintiff's failure to directly report the harassing conduct of her supervisor was unreasonable. *Id.* at 1032–33. The court rejected this attempt with the following analysis:

The undersigned found that Miller may have been hesitant to complain about Piper's conduct given his position as plant manager and his close personal relationship with the company owners. Although the court appreciates that a fear of reprisal does not alleviate an employee's affirmative obligation to report the sexually harassing conduct, the court opines that fear of reprisal does affect to whom an employee reports such conduct.

Id. at 1032 (citations omitted). The court concluded that the plaintiff's report of the sexually harassing conduct to a supervisor who in turn reported the conduct met the requirement that the plaintiff "avoid harm otherwise." *Id.* at 1031–33 (citations omitted).

70. See, e.g., *Childress v. PetsMart, Inc.*, 104 F. Supp. 2d 705, 707, 709 (W.D. Tex. 2000). In *Childress*, the employee's failure to report sexual harassment of supervisor to employer prior to filing an EEOC charge was found to be unreasonable, despite the plaintiff's testimony that she had been told by other employees that making complaints was futile. *Id.* at 709. The court apparently gave no weight to the fact that the plaintiff was in fact terminated one month after filing her charge for discussing the allegations and investigation of her charge with other employees, which the employer had instructed her not to do. *Id.* at 710.

71. See, e.g., *Anderson v. Leigh*, No. 98 C 50169, 2000 U.S. Dist. LEXIS 1584, at *3–4, *22 (N.D. Ill. Feb. 10, 2000). The court in *Anderson* indicated that the plaintiff's "subjective fears" of retaliation were insufficient to justify her delay in reporting the sexually harassing conduct of her supervisor. *Id.* at *22. In characterizing those fears as "subjective," the court apparently gave no weight to the fact that the supervisor had told her, at the same time that he indicated that he wanted to have sex with her, to "watch her work" and had in fact issued an error report to her that was apparently unjustified. *Id.* at *3.

such as evidence that the employer had taken adverse action against other complaining employees.⁷²

Some courts have even found an employee's failure to report sexual harassment to her employer to be unreasonable when the employee was specifically threatened with adverse job consequences if she made such a report. For example, in *Sconce v. Tandy Corp.*,⁷³ the district court held an employee's action in failing to report her supervisor's sexual advances to the employer to be unreasonable; she had instead chosen to file a charge with the EEOC concerning the supervisor's actions. The court reached this conclusion despite the fact that the employee had been told that she would be terminated if she made such a report.⁷⁴ The court held that a threat of termination for reporting sexual harassment was insufficient to justify the failure to report.

Of course, when a supervisor threatens termination an employee may reasonably fear retaliation. To be sure, harassing supervisors often threaten termination in order to intimidate and manipulate their victims. Effective complaint procedures are designed to protect against precisely such retaliatory conduct. They are intended to divest a harassing supervisor of any power he has over the victimized employee. It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection.⁷⁵

Although the court indicated that the affirmative defense could be rebutted by the plaintiff with evidence that she "behaved reasonably due to the particular circumstances,"⁷⁶ it is difficult to imagine what such evidence might look like or what type of showing over and above a threat of termination might cause a plaintiff's failure to report to be found reasonable, particularly if there were a finding that the employer had an effective complaint procedure.⁷⁷ But the very existence of the two-prong affirmative defense indicates that there should and will be circumstances in which the

72. *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) ("A credible fear [of an employer's retaliation] must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints.").

73. 9 F. Supp. 2d 773 (W.D. Ky. 1998). The decision in this case gives no dates or other temporal information from which it can be judged how long the harassment occurred prior to the plaintiff filing a charge of discrimination with the EEOC, other than the fact that she filed the charge after requesting a transfer to a different store. *Id.* at 775. It is likely that the plaintiff felt comfortable filing a charge of discrimination only when she was no longer under the supervisory authority of her harasser.

74. *Id.* at 778 n.2.

75. *Id.* at 778. Although the court noted that the supervisor did not follow through on his threats of retaliation if the employee told anyone of the harassment, there does not appear to have been any reason for such a follow through, given that his threats were effective in causing her not to report the harassment until she was no longer under his supervision, when his ability to follow through was presumably eliminated.

76. *Id.* at 778 n.8.

77. The *Sconce* court appears to have inappropriately blended the two prongs of the affirmative defense by noting that "[e]vidence that procedures are administered fairly and that an employee is not required to report the misconduct to her harasser demonstrates the unreasonableness of the employee's conduct." *Id.* at 778.

employee's failure to report is reasonable even in the face of reasonable employer action.

*Walton v. Johnson & Johnson Services, Inc.*⁷⁸ is a particularly troubling case. In *Walton*, the court held that an employee who had delayed reporting sexual harassment, including several episodes of forcible rape, by her supervisor for just over two and one-half months acted unreasonably, finding on summary judgment that her employer had established the second prong of the affirmative defense as a matter of law.⁷⁹ The court reached this conclusion even though it recognized that the harassment alleged by the plaintiff was "particularly traumatic."⁸⁰ Refusing to find that the trauma excused any delay in reporting, the court stated that problems of workplace harassment cannot be corrected "without the cooperation of the victims"⁸¹ and that victims are required to "make [the] painful effort" of reporting if they want to collect damages for violation of the statute.⁸² The court also dismissed the plaintiff's claim that she was fearful of reporting her supervisor because he had shown her his gun several times; the court noted that he had never threatened her with physical harm and that "the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff employee could escape her corresponding obligation to report sexually harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser."⁸³

One cannot help but wonder what might have convinced the court in the *Walton* case to find the plaintiff's fears of her supervisor to be objectively reasonable or at least "supported." After all, he had already raped her more than once; that alone might have been considered sufficient "physical harm" and therefore supported her fears that she would suffer still more harm at his hands if she reported his conduct. In addition, his actions of brandishing a gun in her presence, even if he did not expressly threaten her with it, might have been considered sufficient to cause the plaintiff to be concerned about her physical safety. The court recognized that she might have been "intimidated" by the gun, but held that her intimidation did not excuse her subsequent failure to report him "when she was out of his presence."⁸⁴ It is as if the court viewed the absence of the supervisor—and his gun—as sufficient to erase from the plaintiff's mind the threat of physical harm that he had already imposed upon her.⁸⁵

78. 347 F.3d 1272 (11th Cir. 2003), *cert. denied*, 541 U.S. 959 (2004).

79. *Id.* at 1289–91.

80. *Id.* at 1290.

81. *Id.* at 1290 (quoting *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000)).

82. *Id.* at 1290 (quoting *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003)).

83. *Id.* at 1291 & n.17.

84. *Id.*

85. That the court did not believe the allegations made by the plaintiff seems clear from the tone of the opinion. The court noted that the employer "had good reason to doubt [plaintiff's] version of the events." *Id.* at 1288 & n.14. The court, however, in reviewing the grant of summary judgment for the employer, was not privileged to let its lack of belief in the plaintiff's credibility affect its analysis of her case or the reasonableness of her action, given that it was required to view the evidence "in the light most favorable to the non-moving party's claims," *id.* at 1274, and the employer had conceded—for purposes of the summary judgment motion—that the plaintiff had established actionable harassment, *id.* at 1280.

Courts generally have given little weight to the special vulnerability of particular employees in determining the reasonableness of a failure to report or a delay in reporting sexual harassment. The fact that employees might be new to the workforce or on probation at the time that they were subjected to sexual harassment does not appear to have factored into the courts' assessment of the employees' concerns about reporting sexual harassment. However, such employees might be particularly worried about the effect that filing complaints of sexual harassment would have on their jobs. This is because new employees and those on probation do not have the credibility and "value" of longer-term employees and because their jobs are presumably less secure in the first place.

For example, the plaintiff in *Dennis v. State of Nevada*⁸⁶ was found to have acted unreasonably in not reporting sexual harassment by her supervisor, even though she indicated that she failed to make a report because she was in her probationary period and "did not want to jeopardize completing the probationary period successfully."⁸⁷ She did discuss the harassment with a fellow employee, who ultimately made a formal report of sexual harassment on her behalf.⁸⁸ The court found that the plaintiff's failure to make a formal complaint for four to five months was unreasonable. The court also found that the retaliation that she feared and in fact suffered as the result of the complaint made on her behalf—consisting of ostracization by her coworkers and receiving undesirable shifts—was not the type of adverse employment action required to state a retaliation claim.⁸⁹

Even more strikingly, in *Reed v. MBNA Marketing Systems, Inc.*,⁹⁰ the district court found the seventeen-year-old plaintiff to have acted unreasonably when she failed to promptly report the sexual harassment by her supervisor, who, in addition to making sexually related comments to her, forced her to perform oral sex on him and then told her not to tell anyone, noting that his father was "good friends with the owner of MBNA."⁹¹ One month after the sexual assault and implied threat of retaliation, the plaintiff quit her job.⁹² When she was rehired nine months later, the harassment reoccurred, and the plaintiff made a formal complaint within a month or so of the reoccurrence of the harassment.⁹³ The court, however, in finding the plaintiff to have unreasonably failed to take advantage of preventive and corrective opportunities, simply noted that she had delayed one year in reporting the most serious incident. The court apparently placed no importance on the nine-month break in her employment, during which she was not subjected to harassment, or her young age at the time her supervisor sexually assaulted and threatened her. In granting summary judgment for the employer, the court indicated that the plaintiff had not even produced any evidence that she had behaved reasonably under the circumstances.⁹⁴

Nor is an employee necessarily protected from a finding of unreasonableness even when she has promptly reported sexual harassing conduct. Employees have also been

86. 282 F. Supp. 2d 1177 (D. Nev. 2003).

87. *Id.* at 1180.

88. *Id.* at 1184.

89. *Id.* at 1184–86.

90. 231 F. Supp. 2d 363 (D. Me. 2002).

91. *Id.* at 367.

92. *Id.* at 368.

93. *Id.* at 367–68.

94. *Id.* at 374–75.

found to have acted unreasonably by declining to participate in certain steps of the employer's investigatory process. For example, the plaintiff in *Jackson v. Arkansas Department of Education*⁹⁵ was found to have acted unreasonably⁹⁶ in part by failing to participate in a face-to-face meeting with department officials and her harasser, although she did otherwise participate in the investigation of her claim of harassment.⁹⁷ Similarly, the district court in *Akers v. Alvery*⁹⁸ suggested that the plaintiff might have acted unreasonably by reporting only some of the approximately thirty incidents of sexual harassment by her supervisor that occurred within a two and one-half month period.⁹⁹

II. HOW "REASONABLE WOMEN" ACTUALLY REACT TO SEXUAL HARASSMENT

A. The Appropriateness of Applying the "Reasonable Woman" Standard to the Issue of Employer Liability for Sexual Harassment

Much discussion in academic commentary and in judicial decisions has been devoted to the question of whether the existence of actionable harassment should be judged by the gender-blind "reasonable person" standard or the gender-conscious "reasonable woman" standard.¹⁰⁰ This discussion has been prompted by the United States Supreme Court's imposition of an objective standard for judging the reasonableness of the harassment victim's reaction to the harassing conduct: not only must the victim of the harassment show that he or she found the conduct to be harmful, but the victim must also show that an objectively reasonable individual would similarly find that conduct to be offensive or abusive.¹⁰¹

95. 272 F.3d 1020 (8th Cir. 2001).

96. *Id.* at 1026.

97. *Id.* at 1023.

98. 180 F. Supp. 2d 894 (W.D. Ky. 2001) (denying summary judgment for the employer, but indicating that the jury could find for either the employer or the employee on the second prong of the affirmative defense because the issue of whether the plaintiff acted unreasonably in reporting some but not all of the sexually harassing conduct by her supervisor presented a question of fact for the jury).

99. *Id.* at 900.

100. See, e.g., Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 525 (1997) (arguing for application of the "respectful person" standard); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1406-20 (1992) (discussing problems with the "reasonable woman" standard); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 136-41 (1992) (suggesting a standard that focuses on "reasonableness" from the perspective of the victim of particular types of harassment); L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 592-606 (1995) (proposing the standard of the "reasonable person in the same or similar circumstances," including the perspective of gender); Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 222-30 (2001) (arguing for use of the "reasonable woman" standard).

101. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (requiring showing that the victim "subjectively perceive the environment to be abusive" and that the conduct "create an objectively hostile or abusive work environment").

Those who have argued for application of a gender-conscious standard for determining whether sexually harassing conduct is objectively hostile or abusive have contended that a gender-conscious standard is necessary because men and women are affected differently by such conduct, in that women are more likely to find sexual conduct in the workplace to be offensive and more likely to be harmed by the presence of such conduct.¹⁰² Accordingly, the use of a purportedly gender-neutral standard is likely to perpetuate the male bias of male-dominated workplaces¹⁰³ (and the male-dominated federal bench).¹⁰⁴

The Court has also imposed a standard of objective reasonableness with respect to another aspect of the question of sexual harassment—that of employer responsibility for the harassing actions of coworkers and supervisors. The employer is required to act reasonably in seeking to prevent sexual harassment from occurring and in responding to harassment that does occur; the employee who has been victimized by sexual harassment, however, is also required to react to that conduct in a reasonable manner, such as by availing himself or herself of preventative or corrective opportunities provided by the employer, unless it would be reasonable not to do so.¹⁰⁵

Whether any justification exists for applying a gender-conscious “reasonable woman” standard in the second prong of the employer’s affirmative defense to vicarious liability for the sexually harassing conduct of supervisors depends on whether there is any justification for believing that men and women generally differ with respect to their responses to harassing conduct and whether those differences are relevant under the standards of reasonableness imposed by the courts. There is, in fact, substantial evidence that such a difference does exist and that women, because of their differences from men in the manner in which they generally respond to sexual harassment, are being disadvantaged by the courts’ definitions of “reasonableness” with respect to those responses.

Studies have indicated that men generally are more likely than women to engage in active responses to experiencing sexual harassment, perhaps in part because women,

102. See, e.g., Barbara A. Gutek, Maureen Ann O'Connor, Renee Melancon, Margaret S. Stockdale, Tracey M. Geer & Robert S. Done, *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 600, 622–26 (Sept. 1999) (“This new standard could facilitate sexual harassment claims by forcing the trier of fact to take the perspective of a reasonable woman. This perspective-taking, in turn, may focus attention on the concerns of a woman who feels harmed by a workplace environment that might seem merely offensive or benign to men (e.g., a workplace permeated by pornography, flirtation, obscenity, and sexual innuendo).”).

103. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (“We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”).

104. Of the 838 active federal judges as of November 2006, 75.7 percent were male and 24.3 percent were female. See Demographic Overview of the Federal Judiciary, http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtRaceGender.asp (last visited November 19, 2006).

105. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–07 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998); see *supra* text accompanying notes 5–41 (discussion of the Court’s holdings in *Faragher* and *Ellerth*).

but not men, are socialized to avoid conflict.¹⁰⁶ For example, studies have indicated that men who experience sexual harassment are more likely than women who have been sexually harassed to formally report the harassment and are more likely to seek legal counsel in response to the sexual harassment.¹⁰⁷ On the other hand, women are more likely than men to directly confront the harasser.¹⁰⁸

Not all studies, however, indicate that men who have been subjected to harassment are more likely than female victims of sexual harassment to report the behavior. In some studies, male victims of sexual harassment have indicated lower rates of formal reporting than women, in part because the men indicated that they found the sexual behavior to which they were subjected less upsetting.¹⁰⁹ In general, both male and female victims of sexual harassment were more likely to report the harassment that they perceived as more severe.¹¹⁰

In other studies indicating lower reporting rates for men than women, the reasons that most men gave for failure to report were different than the reasons given by the majority of women who failed to report. For example, in a 1995 study by the United States Department of Defense, 40 percent of women and 17 percent of men indicated that they had reported harassment to which they were subjected to someone in their chain of command or that of the harasser.¹¹¹ For those victims who chose not to report, the majority of the men did so because they "did not think it was that important" (51 percent of the men compared to 35 percent of the women),¹¹² while the majority of the women who did not report indicated that they failed to do so because they "took care of the problem" themselves (54 percent of the women compared to 47 percent of the men).¹¹³ Women were more likely than men to indicate that they did not report the harassment because of the fear of negative consequences as a result of such reporting, including being labeled a troublemaker, not being believed, or fear that evaluation of their performance would suffer as a result of making such a report.¹¹⁴

106. Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. OF VOCATIONAL BEHAVIOR 102 (1993).

107. Caren B. Goldberg, *The Impact of the Proportion of Women in One's Workgroup, Profession, and Friendship Circle on Males' and Females' Responses to Sexual Harassment*, 45 SEX ROLES 359, 371 (2001). But see Jennifer L. Berdahl, Vicki J. Magley & Craig R. Waldo, *The Sexual Harassment of Men?*, 20 PSYCHOL. OF WOMEN Q. 527, 541, 543 (1998) (reporting results of a study concerning sexual harassment of men, in which most of the men who indicated that they had been sexually harassed indicated that they confronted the harasser or reported the behavior, in contrast to the observation that most women do not report sexual harassment; author noted, however, that both men and women who have not been harassed often say that they would report harassing behavior if they were subjected to it).

108. Goldberg, *supra* note 107, at 366.

109. See Caroline C. Cochran, Patricia A. Frazier & Andrea M. Olson, *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207, 218-19 (1997) ("Men perceived harassment as less severe, and were less likely to avoid the harasser, talk to others, and confront or report the harasser.").

110. *Id.*

111. Department of Defense 1995 Sexual Harassment Study, http://www.defenselink.mil/news/fact_sheets/sxhas95.html (last visited Nov. 17, 2006).

112. *Id.*

113. *Id.*

114. *Id.* Twenty percent of the women and 10 percent of the men "did not think anything would be done"; 25 percent of the women and 13 percent of the men thought reporting the

Other research has demonstrated similar differences between men and women, indicating that women are much more likely to feel comfortable using informal means of trying to resolve problems with sexual harassment, because formal means of dispute resolution tend to be inconsistent with the manner in which they view conflict resolution.¹¹⁵ In particular, women who have been sexually harassed have expressed that their primary objective is to stop the harassing behavior and preserve the relationship between the parties, rather than to punish the harasser.¹¹⁶ These women's objectives are much more likely to be accomplished by informal, rather than formal, means of dispute resolution.¹¹⁷

The more passive responses of women to sexual harassment appear to be an aspect of the types of behavior that are culturally expected of women. Men, after all, are expected to be assertive and aggressive, while women are generally expected to be more passive¹¹⁸—and are frequently punished for assertive or aggressive behavior.¹¹⁹ In addition, women are generally expected to take on the role of maintaining social relationships, regardless of whether these relationships occur in or out of the workplace.¹²⁰ Nonassertive or passive reactions are common responses to inappropriate social behavior, in order to allow the other person to save face and to preserve a relationship; it is actually the more assertive responses that are the exception, as they

harassment “would make [their] work situation unpleasant”; 17 percent of the women and 8 percent of the men indicated that they “would be labeled a troublemaker”; 13 percent of the women and 10 percent of the men indicated that they “did not want to hurt the person who bothered [them]”; 11 percent of the women and 6 percent of the men said they were “too embarrassed”; 9 percent of the women and 3 percent of the men said they “thought [they] would not be believed”; and 8 percent of the women and 5 percent of the men said they “thought [their] performance evaluation would suffer.” *Id.*

115. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment: Policies and Procedures*, in AMERICAN WOMEN IN THE NINETIES: TODAY'S CRITICAL ISSUES 213, 219–21 (Sherri Matteo ed., 1993) (discussing gender differences in orientation to conflict and a comparison between informal and formal methods of dispute resolution); see also Deborah Ware Balogh, Mary E. Kite, Kerri L. Pickel, Deniz Canel & James Schroeder, *The Effects of Delayed Report and Motive for Reporting on Perceptions of Sexual Harassment*, 48 SEX ROLES 337, 339 (2003) (“[M]any women hold values that emphasize responsibility to others and restoration of harmony, and these values conflict with dispute resolution procedures designed to determine guilt or innocence of the alleged offender.”).

116. Riger, *supra* note 115, at 219–21.

117. *Id.*

118. See James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 558 (1995) (noting both that men tend to react more aggressively than women and that assertive responses may be “out-of-role” for women).

119. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse v. Hopkins*, the female plaintiff was denied partnership in an accounting firm because of her aggressive and abrasive behavior and failure to comply with stereotypical expectations of behavior for women. The plurality noted that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.” *Id.* at 251.

120. Gruber & Smith, *supra* note 118, at 547, 558 (noting that the role of women as being responsible for the “maintenance work of social interactions” are “culturally prescribed and organizationally reinforced” and that “[m]any women use less assertive responses in order to manage the harassment in a way that does not interrupt work routines or relationships”).

are particularly harmful to relationship preservation.¹²¹ Accordingly, expecting women to react to sexually harassing conduct in a way that is different than the manner in which they have been socialized—and to react that way immediately and as their first response to such conduct—punishes women for acting in precisely the ways that they are generally expected to act.

The different ways in which women and men react to sexual harassment are particularly problematic for the legal rights of women because women are more likely to invoke informal means of trying to resolve problems of sexual harassment, while judges considering the reasonableness of the victim's reaction to harassing conduct place a premium on formal means of resolving sexual harassment claims. In addition, judges' expectations for immediate formal complaints in response to sexually harassing behavior are unlikely to be met by women, who are more likely to attempt other coping mechanisms in response to offensive conduct.¹²² Women generally resort to more formal means only after their initial efforts have failed.¹²³

Women who use more informal and interpersonal methods of dealing with sexual harassment are often portrayed as "doing nothing,"¹²⁴ a characterization that makes it more likely that courts will find their failure to take proactive steps to deal with the harassment unreasonable. But in fact these women are "doing something," and their efforts to cope with and deal with the harassment may be as effective—or at least not substantially less effective—as a method of coping with the occurrence of sexual harassment in their workplaces than the more assertive responses judges expect them to take.¹²⁵ After all, as discussed below, taking formal action in response to sexual

121. See *id.* at 557 (noting that less assertive responses, such as ignoring inappropriate behavior, avoiding interactions, and explaining away inappropriate behavior, are the "basis of all social interaction" and that assertive responses are the exception rather than the rule in social interactions).

122. See Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOC. ISSUES 117, 119–21 (1995). The range of coping mechanisms used by women in response to sexual harassment includes internally focused responses, such as endurance of the harassment, denial, and reattribution, and externally focused responses, such as avoidance of the harassment, appeasement or "putting off" the harasser without direct confrontation, seeking social support, asking the harasser to stop the behavior, and seeking institutional or organizational relief. *Id.* at 119. Victims generally use the least confrontational strategies first, turning to the more assertive strategies "as a last resort when all other efforts have failed." *Id.* at 121.

123. See Deborah Erdos Knapp, Robert H. Faley, Steven E. Ekeberg & Cathy L. Z. Dubois, *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. OF MGMT. REV. 687, 709 (1997) (noting that the more frequent the sexual harassment the more likely the target of the harassment will make a formal complaint).

124. See Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. OF ORGANIZATIONAL BEHAV. 329, 330 (1998) (noting the tendency of victims of harassment to take no action in response to sexually harassing behavior; in characterizing the possible courses of action that women can take in response to being sexually harassed, the authors listed four choices, the first three involving personally confronting the harasser or invoking formal procedures to report the harassment and the last being to "choose to do nothing about the harassment").

125. Fitzgerald et al., *supra* note 122, at 129 (noting that it is "not possible to assert a priori that any particular category of response [to sexual harassment] is, by definition, either

harassment has not been generally positive for women. While women may have valid reasons for their reluctance to use formal reporting methods, or their delay in invoking such methods, these actions are likely to be seen as diminishing the credibility of the victim and the culpability of the harasser.¹²⁶ In addition, as demonstrated above,¹²⁷ these actions pose difficulties for the ability of women to hold their employers liable for the sexually harassing behavior of supervisory employees.

B. The Reasonableness of Women's Responses to Sexual Harassment

Federal judges considering claims of sexual harassment under Title VII appear to have fairly definite views about how women who are subjected to sexual harassment should react in response to sexual conduct directed at them in the workplace. Women who are subjected to this behavior should firmly and unambiguously indicate to their harasser their objection to the behavior, while simultaneously making an immediate and formal complaint of harassment under the employer's sexual harassment policy, if any. They should not request confidentiality in making the complaint and they should not ask that the employer not take formal disciplinary action against the harasser. They should fully cooperate in any investigation of the allegations of sexual harassment, providing a full account of all details regarding the sexual conduct directed against them. And they should take these actions fully confident that they will suffer no adverse action from management, from the harasser, or from coworkers in connection with making or pursuing the complaint.¹²⁸

Although this is the way in which judicially constructed "reasonable women" are expected to act, real women who have been sexually harassed rarely behave in this manner. The courts often find women failing to live up to this standard of behavior to be unreasonable, but empirical evidence suggests that most women do not react to sexual harassment in the way that courts apparently think that they should. Surveys of victims of sexual harassment reflect that relatively few women subjected to sexual harassment make formal complaints about that behavior.¹²⁹

For example, a 1994 survey conducted by the Merit Systems Protection Board suggested that only 6 percent of the individuals, male and female, who reported being

appropriate or effective" and rejecting the "equation of assertive responding with effectiveness, as well as that of coping with mastery more generally"; authors indicate that "[t]he issue of what responses are associated with what outcomes under what conditions is an empirical question, rather than an a priori assertion").

126. See Balogh et al., *supra* note 115, at 344–45. The results of a study of delays in reporting of sexual harassment indicate that "[j]udgments also are influenced by the timing of the report in that the victim's credibility may be diminished as a result of delaying the accusation." *Id.* at 344. The study goes on to report that "a delay in responding may foster negative evaluations of the victim among observers and result in less negative perceptions of the perpetrator, including the extent to which he is ascribed blame for the incident." *Id.* at 345.

127. See *supra* Part I.B.1.

128. See *supra* Part I.B.1.

129. See Sandy Welsh & James E. Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, CANADIAN REV. OF SOC. & ANTHROPOLOGY 559, 559–60 (1999) ("Research from the early 1980s to the present has found consistently that women who have experienced sexual harassment . . . infrequently confront the harasser or report the behavior to someone in a position of authority. The number of women who file a grievance or complaint is even smaller.").

sexually harassed took formal action as a result of the harassment and only 12 percent of sexual harassment victims took the informal action of reporting the harassment to a supervisor or other official.¹³⁰ The most common reaction to sexual harassment reported by the Merit Systems Protection Board survey was to ignore the behavior—a reaction reported by 44 percent of the male victims and 45 percent of the female victims.¹³¹ Other common reactions included: asking or telling the person to stop (23 percent of male victims and 41 percent of female victims); avoiding the harasser (20 percent of male victims and 33 percent of female victims); making a joke of the behavior (15 percent of male victims and 14 percent of female victims); and threatening to tell or telling others (5 percent of male victims and 13 percent of female victims).¹³² Similar results have been obtained in other studies.¹³³

Although the courts might conclude—despite the frequency of these reactions—that the manner in which most women respond to sexual harassment is simply unreasonable, it should be a source of concern if courts generally hold behavior that is typical for women to be unreasonable. In addition, there is a danger in judging how women who have been sexually harassed should act by the way that judges, who are not as likely to be subjected to such conduct, think that they themselves would act, or even relying on what research conducted on nonvictims suggests test subjects would do if they were in fact sexually harassed.

One need not attribute any inappropriate motive to federal judges who inaccurately assess how victims of sexual harassment are likely to respond to sexually harassing behavior. Perhaps it is not even surprising that federal judges, who are predominately male and therefore statistically less likely to have been the victims of sexual harassment themselves, believe victims of sexual harassment should make prompt, formal complaints when they are subjected to harassment. Judges appear to believe that women should make prompt formal complaints about sexually harassing behavior because formal procedures are seen as the most effective manner in which sexual harassment can be prevented before it occurs, becomes serious, or otherwise corrected after it occurs.¹³⁴

130. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE* 30, 33 (1995), available at <http://www.mspb.gov/studies/sexhar.pdf>. Thirteen percent of the female victims of sexual harassment and 8 percent of the male victims of sexual harassment indicated that they had reported the sexually harassing behavior to a supervisor or other official. *Id.* at Appendix 5.

131. *Id.* at Appendix 5.

132. *Id.*

133. See, e.g., Belle Rose Ragins & Terri A. Scandura, *Antecedents and Work-Related Correlates to Reported Sexual Harassment: An Empirical Investigation of Competing Hypotheses*, 32 *SEX ROLES* 429, 438 (1995) (in study of 620 female employees of a municipal county government in the Southeastern United States, respondents indicated the following responses to experiencing sexual harassment: “ignore it” (18.8 percent); “laugh it off” (26.0 percent); “ask offender not to repeat it” (20.8 percent); “get angry” (20.8 percent); “report it” (13.5 percent)). See also Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 157–58 (William O’Donohue ed. 1997) (discussing results of numerous studies that indicate that the most common response to sexual harassment is to ignore it and that filing a formal complaint is an uncommon occurrence).

134. For example, Justice Kennedy, writing for the majority in the *Ellerth* case, suggested

These views about the effectiveness and appropriateness of making formal complaints with respect to sexual harassment appear to be held by the public more generally. One of the sentiments expressed by members of the public in response to the allegations of sexual harassment made by Professor Anita Hill against then judge, now Justice, Clarence Thomas, was displeasure with Professor Hill's failure to respond in a timely and assertive manner to the conduct that she alleged.¹³⁵ Polling at the time indicated that some members of the public responding did not "believe Anita Hill" and justified their lack of belief on that fact that she had failed to file a charge against Thomas at the time of the incidents.¹³⁶ This sentiment was captured by the comment made by one of the senators involved in the Thomas confirmation hearings: "If you've been sexually harassed, you ought to complain! . . . I mean, where's the gumption?"¹³⁷

These views also find some support in the sexual harassment research, at least when that research is conducted on nonvictims. When research subjects are asked about the appropriate methods of responding to harassment, the majority of them indicate that a direct response to harassment, such as filing a complaint, is the most appropriate method of response and that they themselves would report the harassment if they were subject to the behavior.¹³⁸ However, research has shown that actual victims of sexual harassment rarely behave in the way research participants or other nonvictims indicate that they would respond if they were sexually harassed.¹³⁹

that the "deterrent purpose" of Title VII would be served by limiting employer liability to "encourage employees to report harassing conduct before it becomes severe or pervasive." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). That is, it appears that Justice Kennedy, as well as the members of the Court who joined the majority opinion, generally believe that formal reporting of sexual harassment is likely to stop sexually harassing behavior. This is an expectation that is not necessarily borne out by sexual harassment cases generally, or even those particular cases that have been in front of the Court itself. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998) (noting that "Oncale's complaints to supervisory personnel produced no remedial action" and that the harassment of the plaintiff ceased only when he quit his job, "asking that his pink slip reflect that he 'voluntarily left due to sexual harassment and verbal abuse'").

135. *See Gruber & Smith, supra* note 118, at 543-44 ("The general perception of the public was that Hill did not respond in an assertive or timely manner; consequently, her inaction reduced her credibility as a victim of hostile and offensive behavior.").

136. *See Fitzgerald et al., supra* note 122, at 118.

137. *Id.* at 117 (quoting Senator Dennis DeConcini).

138. *See Gruber & Smith, supra* note 118, at 544 (noting that research subjects in various studies advocated direct and assertive responses to sexual harassment, such as verbally confronting the harasser or reporting the harasser and indicating that "beliefs about the social benefits of assertive behavior—that the harasser will cease the unwelcomed advances or that the organization will respond quickly and appropriately—creates substantial problems for real harassment recipients").

139. *See Fitzgerald et al., supra* note 122, at 119 (indicating that current frameworks for classifying responses to sexual harassment are problematic because they are not based on the reactions of actual victims and that "actual victims have been shown to behave quite differently than research participants or the general public say they would behave"); Sarah Barton Samolouk & Grace M.H. Pretty, *The Impact of Sexual Harassment Simulations on Women's Thoughts and Feelings*, 30 *SEX ROLES* 679, 695 (1994) (recognizing, in the context of determining the assertiveness of responses to sexual harassment, that "rating one's intentions to act in a particular way is not necessarily a predictor of what one would actually do in a real situation"); Janet Sigal, Jane Braden-Maguire, Ivy Patt, Carl Goodrich & Carrol S. Perrino,

This conflict between the way research participants say they would act if they were subjected to sexual harassment and the experiences of actual victims likely has to do with the differences in effect between real and fictional sexual harassment. Victims of sexual harassment must decide how to respond to a stressful situation and must balance the options that are available to deal with the situation and the risks involved. Research participants, generally asked to respond to scenarios presented in videos or on paper, are neither subject to the actual stress of harassment nor face any real consequences for the choices that they say they would make.¹⁴⁰ The divergence between the anticipated responses of nonvictims and the actual responses of real victims suggests that individuals who have not been the victim of sexual harassment may have a difficult time accurately anticipating how they would actually react if they were subjected to harassment. Individuals who are members of groups who are unlikely, or at least less likely, to be sexually harassed themselves may be even less capable of making accurate assessments of the reasonableness of the responses of victims.

But it is not just the typicality or commonness of women's responses to sexual harassment that should lead courts to conclude that women who do not immediately complain about sexual harassment or file formal or informal complaints have still acted reasonably. Instead, the reasons that women engage in such conduct—or refrain from acting the way courts seem to believe that they should act—need to be explored.

Women who have failed to report incidents of sexual harassment against them have given a number of reasons for that failure to report. In response to the 1994 Merit Systems Protection Board survey, a number of the male and female victims of sexual harassment indicated that they did not make a formal report of sexual harassment because they believed the harassment was not serious enough to warrant formal action or because other actions had resolved the situation to their satisfaction. However, other reasons, more damaging to the victims, were also given by a substantial number of respondents for their failure to complain formally. These reasons included fear of retaliation, concerns about confidentiality and whether any action would be taken, concern about harm to the harasser, and concerns about harm to themselves, including suffering damage to their careers, being blamed for the harassment, and not being believed.¹⁴¹

Effects of Coping Response, Setting, and Social Context on Reactions to Sexual Harassment, 48 SEX ROLES 157, 163 (2003) (reporting the results of studies revealing the dichotomy between one's attitudes toward sexual harassment generally and one's specific behavior in response to actual sexual harassment).

140. See Fitzgerald et al., *supra* note 122, at 125. Inconsistencies between analogue and victim studies are explained by the fact that the usual procedures used on analogue research are not likely to be viewed as threatening by participants. *Id.* at 125–26. “Analogue procedures are by definition nonstressful and thus have little to say about the experiences and reactions of actual victims, are likely to be substantively misleading, and are vulnerable to being exploited for inappropriate purposes.” *Id.* at 126.

141. U.S. MERIT SYS. PROT. BD. *supra* note 130, at 35. Respondents to the survey indicated that they did not take formal action because they did not believe the harassment was serious enough to warrant formal action (50 percent), that other actions taken satisfactorily resolved the situation (40 percent), that they thought a complaint would worsen their work situation (29 percent), that they thought nothing would be done (20 percent), that they had concerns about confidentiality (19 percent), that they did not want to hurt the harasser (17 percent), that they thought a formal complaint would damage their career (17 percent), that they were embarrassed (11 percent), or that they thought they would be blamed (9 percent) or not believed (8 percent).

Other studies have also indicated that women fail to report sexual harassment because they fear being blamed for the harassment.¹⁴² This fear of being blamed appears to be far more pervasive among women than men. Because of cultural factors and sexual stereotypes, women are often considered to be responsible for controlling the sexual conduct of men¹⁴³ and are commonly blamed for their failure or inability to do so.¹⁴⁴ After all, almost all of the cases discussing the "unwelcomeness" requirement and seeking to determine whether the sexually harassing conduct was provoked by the target's dress or conduct involve women as victims. While the courts appear to have fairly common understandings of the behaviors of women that are deemed to invite sexual conduct,¹⁴⁵ courts rarely consider whether men as victims have "invited" or "provoked" sexual conduct by their mannerisms or their dress.¹⁴⁶

Women who fear being blamed for the sexual harassment to which they are subjected have considerable justification for their fear. Studies have shown that the attribution of blame to the target of sexual harassment is a fairly common reaction, with men being more likely than women to attribute blame to a female victim of harassment.¹⁴⁷ Part of this difference appears to be attributable to the fact that women

Respondents were allowed to choose more than one reason and, based on the percentages reported, obviously did so. Accordingly, even the half of respondents who indicated that they did not report the behavior because it was not serious enough generally also must have reported concern about the negative consequences of making a formal report. *Id.*

142. See Ragins & Scandura, *supra* note 133, at 435 (reporting results of studies that indicate fear of being blamed for the harassment was a primary reason for women not reporting the harassment).

143. See, e.g., Tanya Davis & Christina Lee, *Sexual Assault: Myths and Stereotypes Among Australian Adolescents*, 34 SEX ROLES 787, 801 (1996) (noting studies concerning adolescent boys and girls' attitudes about sexual assault, in which men are excused for their criminal behavior and women are encouraged to blame themselves for their victimization, both being consistent with a belief that it is "a girl's responsibility to control boys' sexuality").

144. For a relatively extreme example of this attitude, see testimony of Phyllis Schlafly before the Senate Labor Committee: "When a woman walks across the room, she speaks with a universal body language that most men intuitively understand. Men hardly ever ask sexual favors of women from whom the certain answer is 'no.' . . . Virtuous women are seldom accosted by unwelcome sexual propositions or familiarities, obscene talk, or profane language." *Sex Discrimination in the Workplace, 1981: Hearings Before the S. Comm. on Labor and Human Resources*, 97th Cong. 400 (1981) (testimony of Phyllis Schlafly, President, Eagle Forum), *quoted in The Mud Slinger*, N.Y. TIMES, Apr. 26, 1981, at 22.

145. See *supra* note 1.

146. See, e.g., *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1208, 1211-12 (D.R.I. 1991) (although court noted that the male plaintiffs contributed to the atmosphere of sexual innuendo at the workplace, the court held that the "clear weight" of the evidence indicated that they did not welcome the requirement that they participate in sexual activity with their supervisor's secretary, even though they did in fact engage in sexual conduct with her; the court held that "[b]oth eventually participated only because they feared the noncompliance would cost them their jobs" and that one of the plaintiffs had "clearly expressed his resistance to the sexual activities by deciding to leave" a strip poker game after five minutes). *But cf.* *Kennedy v. GN Danavox*, 928 F. Supp. 866, 871-72 (D. Minn. 1996) (holding that the male plaintiff did not create issue of fact sufficient to preclude summary judgment on his claim of sexual harassment, in part because he did not show that the conduct of his female supervisor, including signing her notes with the word "love," was unwelcome because he never communicated to her that he was uncomfortable with her conduct).

147. Riger, *supra* note 115, at 217.

generally experience sexual harassment more than men and, as past and potential targets of such harassment, are less likely to attribute blame to similarly situated persons. Men, on the other hand, are less likely to identify with the victim of sexual harassment.¹⁴⁸

Another reason that victims of sexual harassment give for not making a formal complaint of sexual harassment—concern for harm that might occur to the harasser if a complaint is made—also appears to be given more frequently by women than men. Some research has demonstrated that female victims of sexual harassment are less likely to respond directly to harassment because of concern that harm would come to the harasser as a result.¹⁴⁹ It appears that women are more likely to be affected by this factor than are men because women are generally socialized to be more relationship oriented than are men.¹⁵⁰

Women working in male-dominated positions may be particularly reluctant to take formal action to report sexually harassing conduct to which they are subjected, at least in part because their standing in such workplaces is more precarious and because they lack the support structures that may encourage other women to report sexually harassing conduct.¹⁵¹ Women in such positions may be particularly concerned with

148. See Margaret De Judicibus & Marita P. McCabe, *Blaming the Target of Sexual Harassment: Impact of Gender Role, Sexist Attitudes, and Work Role*, 44 SEX ROLES 401, 413–15 (2001) (noting results of a study that found men overall are less likely to experience sexual harassment, are less likely to identify with the victim, and consistently blame the target of sexual harassment more than women); Jeanne Henry & Julian Meltzoff, *Perceptions of Sexual Harassment as a Function of Target's Response Type and Observer's Sex*, 39 SEX ROLES 253, 255 (1998) (reporting the results of several studies that have found nothing influences the perceptions of sexual harassment as powerfully as the gender of the person making the judgment, “women being more likely than men to interpret less severe behaviors as constituting sexual harassment,” and men being more likely than women to blame the victim of sexual harassment).

149. See Kimberly M. Cummings & Madeline Armenta, *Penalties for Peer Sexual Harassment in an Academic Context: The Influence of Harasser Gender, Participant Gender, Severity of Harassment, and the Presence of Bystanders*, 47 SEX ROLES 273, 278 (2002) (reporting results of research indicating that female victims of harassment are often unlikely to respond directly to sexual harassment because of fear that the harasser would lose his job or family members of the harasser would suffer).

150. See Suzanne L. Osman, *Victim Resistance: Theory and Data on Understanding Perceptions of Sexual Harassment*, 50 SEX ROLES 267, 267 (2004) (observing that women may respond passively to sexual harassment in order to remain friendly with the harasser in order to preserve the working relationship, consistent with “traditional passive and relationship-oriented feminine behavior”).

151. See Ragins & Scandura, *supra* note 133, at 445 (reporting study results that women in blue-collar, male-typed occupations are more likely to experience sexual harassment than women in white-collar jobs, but are more likely to ignore the harasser or dismiss the incident rather than reporting the harassment and suggesting that this result may be attributable to greater alienation and lack of coworker support among blue-collar women in male-typed occupations); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 821, 823 (1986) (noting that women who constitute a “highly visible minority” in a work area, such as women in male-dominated work environments, are generally subject to frequent and severe harassment, but they respond to the sexual harassment more passively than do women in other

their ability to fit into the workplace and be "one of the boys," and they may understandably be worried that reporting sexual harassment will prevent their acceptance by their coworkers—an acceptance that they understand to be critical to their professional success.¹⁵²

Ironically, the very fact of being subjected to sexual harassment in the workplace may make some women less likely to report the behavior. This appears to be particularly true for women with low self-esteem and who lack other support structures in their lives. Research has indicated that women who have fewer personal resources—including women with low self-esteem and low life satisfaction—respond to sexual harassment in a more passive manner than women with greater personal resources. Because experiencing severe or frequent sexual harassment reportedly results in diminished self-esteem and life satisfaction, the very occurrence of sexually harassing conduct may make it less likely that the conduct will be reported. As the authors of one study suggest, "sexual harassment lowers the self-esteem and life satisfaction of women, which in turn decreases their ability to respond to harassment in an assertive manner."¹⁵³

Women who fear negative consequences as a result of making a formal complaint of sexual harassment are not unreasonable in having those fears, because negative consequences in fact often occur precisely because a formal complaint of sexual harassment has been made. Studies have suggested that both men and women tend to evaluate victims of sexual harassment more negatively when the victims label conduct taken against them as harassment and take assertive steps in formally reporting the harassment.¹⁵⁴ It appears that women are particularly susceptible to the negative

work situations).

152. See, e.g., *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991) (testimony by the plaintiff in sexual harassment action, who did not complain and apparently participated in some of the harassing conduct, that "[i]t was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut"); see also *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 560 (7th Cir. 1992) (noting testimony by expert witness, and apparent reliance on that testimony by district court, that "few victims of sexual harassment make a contemporaneous complaint, particularly if the harassment occurs in an occupation traditionally dominated by members of the opposite sex"); Fitzgerald et al., *supra* note 122, at 131–32 (discussing *Reed* case and the plaintiff's perception that she was required to participate in the harassment in order to be accepted by her male coworkers); Knapp et al., *supra* note 123, at 704 ("Because they are under great pressure to 'fit in,' women in nontraditional occupations are less likely to report incidents of [sexual harassment] than their counterparts in more gender-traditional occupations.").

153. Gruber & Bjorn, *supra* note 151, at 822 (explaining personal resource model and data indicating that "the experiences of severe or frequent harassment affect women's personal resources" and that "their personal resources in turn affect their reactions or responses to [sexual] harassment").

154. See Balogh et al., *supra* note 115, at 344 (reporting results of research indicating that the "mere acts of labeling behavior as sexually harassing and reporting that behavior have negative consequences for women," including being perceived as less trustworthy and less feminine); Amy J. Marin & Rosanna D. Guadagno, *Perceptions of Sexual Harassment Victims as a Function of Labeling and Reporting*, 41 SEX ROLES 921, 934 (1999) (reporting survey results indicating that women who labeled and reported sexual conduct against them as sexual harassment were evaluated by both male and female evaluators as more responsible for the sexual behavior directed at them, more aggressive, less feminine, less likeable, and less trustworthy than women who did not label and report the conduct as sexual harassment).

reactions of others to their complaints of discrimination. Studies have indicated that women who confront discrimination are disliked and perceived as “troublemakers” and “hypersensitive”—even when their complaints of discrimination are meritorious.¹⁵⁵ In fact, in some studies, women who confronted the most blatant forms of discrimination received harsher disapproval than women who objected to more ambiguous forms of discrimination.¹⁵⁶ In contrast, men who identify themselves as victims of discrimination are less likely to suffer negative social costs as a result.¹⁵⁷

In addition, studies of women who have made complaints of sexual harassment demonstrate that such women have often faced retaliation, including ostracization by their coworkers, loss of opportunities for advancement, transfer to less desirable positions, and even loss of employment.¹⁵⁸ In fact, for a substantial number of sexual harassment victims, making a formal complaint actually resulted in them being worse off.¹⁵⁹ More assertive responses of women to sexually harassing conduct have been associated with more negative consequences than for women who responded more passively, both with respect to job-related consequences and to psychological and health-related results.¹⁶⁰

It also appears that the climate of the particular workplace and management’s actual or perceived receptivity to receiving complaints of sexual harassment affect the willingness of women to make formal complaints of sexual harassment.¹⁶¹ Not all employers who have formal policies on sexual harassment enforce those policies with the same degree of emphasis or enthusiasm. Employers who take steps in addition to adopting formal policies against sexual harassment in order to prevent and remedy sexually harassing behavior are likely to make women feel safe and secure in taking more assertive steps in response to the sexual harassment they encounter.¹⁶²

155. See Brake, *supra* note 4, at 32 (describing studies in which women and minorities who confronted discrimination received more negative consequences than men and members of majority groups complaining of discrimination).

156. *Id.* at 34.

157. *Id.* at 32–36 (describing studies in which women and minorities who confronted discrimination received more negative consequences than men and members of majority groups complaining of discrimination).

158. See Fitzgerald et al., *supra* note 122, at 122–23 (reporting the results of studies indicating that employees who respond to sexual harassment have faced lower job evaluations, denials of promotions, transfer, and loss of employment, and that the employees making the most assertive responses, including filing formal claims, suffered the more negative outcomes).

159. *Id.* Negative outcomes from victims of sexual harassment filing formal complaints have included job-related repercussions (e.g., being fired, transferred, or denied promotion), to a wide range of psychological and health-related ailments.

160. See Dansky & Kilpatrick, *supra* note 133, at 158–59 (discussing results of studies indicating that more-direct responses to sexual harassment are associated with “more deleterious job-related and health-related consequences,” and noting that “the association between direct responding and negative outcomes was present even after the influence of harassment severity was statistically controlled”); Welsh & Gruber, *supra* note 129, at 578–79 (reporting results of studies showing that assertiveness in response to sexual harassment causes both adverse psychological effects and negative changes in the work environment).

161. See Gruber & Smith, *supra* note 118, at 559 (“[T]he climate of an organization toward sexual harassment is a factor in women’s assertiveness.”).

162. See *id.* at 553 (reporting results of survey finding that actual female victims of sexual harassment were more likely to take assertive action in response to sexual harassment if the

As demonstrated above, women who are reluctant to make formal complaints of sexual harassment often have considerable justification for their failure to take such action or their delays in doing so. Their concerns about the negative consequences of reporting, including the negative effects on themselves, their work relationships, and even their harassers, are not unreasonable, but are in fact often borne out by subsequent events. In addition, their relative passivity in responding to sexually harassing behavior and their gradual movement from more-passive to more-assertive responses is consistent both with the way in which women are generally socialized and with the cultural expectations that society has of women. Accordingly, the conclusions of courts that women who delay or fail to make formal reports of sexual harassment are necessarily acting unreasonably contradicts the available empirical evidence and imposes expectations upon women that experience demonstrates few of them will meet.

This is not to say that women who fail to make formal complaints of sexual harassment—or who delay in making such reports—are necessarily acting in a reasonable manner. Just as the reasonableness of employer actions to prevent or correct sexual harassment must be judged on a case-by-case basis, it is also appropriate to judge individually the behavior of particular women responding to particular incidents of harassment—but with a better understanding than courts have shown to-date of the social and organizational barriers that women face in responding to sexually harassing behavior. And such a better understanding likely would be aided by an awareness of the role that gender plays in shaping those responses.¹⁶³

CONCLUSION

A number of courts that have been asked to judge the reasonableness of women's responses to sexual harassment—particularly the failure to promptly file formal complaints in response to the first instance of sexually harassing behavior—have found women's responses to be unreasonable and have thereby precluded those women from establishing employer liability or recovering damages for the injuries caused by such harassment. In making these decisions, the courts do not appear to have taken into account the reasons that women often do not behave in the way in which the courts expect them to.

The empirical evidence about women's responses to sexual harassment suggests that at least initially, women usually choose measures other than filing formal complaints to respond to sexual harassment, and that the majority of women never file formal complaints. This Article has addressed why women act in that manner and has argued

employer had multiple policies and procedures in place—including pamphlets, posters, and presentations—for dealing with sexual harassment).

163. By my emphasis on the role that gender plays in the responses of female victims of sexual harassment, I do not mean to suggest that men who have been sexually harassed do not also face obstacles in reporting sexually harassing conduct. In fact, some of those obstacles, particularly those faced by men whose positions in the workplace are more precarious—such as members of minority groups, gay men, and other “disfavored” men—may mirror those of women. In addition, male victims of sexual harassment may also face issues of credibility and having their complaints taken seriously, in part because men are presumed not to object to sexually related conduct being directed at them, particularly sexual conduct by women. Accordingly, the proposed standard of a reasonable person in the circumstances of the plaintiff, including a consideration of gender, would seem to capture the special burdens imposed on male victims of sexual harassment, as well as the special burdens imposed on female victims.

that they are often entirely reasonable in doing so, both because of the workplace situations in which they find themselves and the likely consequences that they would face if they made such a formal complaint.

The use of the “reasonable woman” standard with respect to judging the actionability of sexual harassment has resulted in some courts being more cognizant of the effect of gender in determining the harm caused by sexually harassing conduct. Applying the “reasonable woman” standard, or the standard of the “reasonable person in the same circumstances as the plaintiff,” including gender, would assist courts in being more cognizant of the effect gender has on the reasonableness of responses to being sexually harassed, in particular whether a formal complaint is filed. Because of the Supreme Court’s decisions in *Ellerth* and *Faragher*, and the lower courts’ interpretations of those decisions, a premium has been placed on the reasonableness of the victim’s conduct in responding to sexual harassment. Use of the “reasonable woman” standard may allow those courts to see that gender matters and may serve to challenge the notions of (mostly male) federal judges that their view of the reasonableness of women’s conduct is necessarily the appropriate standard.

